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No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the City violated the First Amendment by terminating business with an independent contractor solely because the contractor exercised his constitutionally protected right of political belief and association by supporting the incumbent mayor's political opponent for election?

RULE 29.1 LISTING

Petitioner O'Hare Truck Service, Inc. is a corporation that has no parent companies or subsidiaries.

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CITY OF NORTHLAKE, MAYOR REID PAXSON,
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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Petitioners O'Hare Truck Service, Inc. and John A. Gratzianna respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 10, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought by this petition, is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995). It is reprinted in the appendix of this petition at pages 2a-9a (hereinafter "App. __"). The opinion of the United States District Court for the Northern District of Illinois is reported as *O'Hare Truck Service, Inc. v. City of Northlake*, 843 F. Supp. 1231 (N.D. Ill. 1994), and is reprinted in the appendix, App. 10a-19a.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. Petitioners appealed this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On February 10, 1995, the Court of Appeals affirmed the District Court's decision. Rehearing by the Court of Appeals was denied on March 3, 1995. App. 1a.

On May 25, 1995, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including July 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner O'Hare Truck Service, Inc. ("O'Hare") is a business located in Northlake, Illinois, that provides towing services at the request of municipalities throughout Cook and DuPage Counties in northern Illinois. O'Hare is owned and operated by Petitioner Gratzianna. App. 21a, para. 2.

Since 1965, O'Hare has participated in a system through which it provided the City of Northlake with towing services when the City needs a vehicle towed, as a result of an accident, mechanical breakdown, abandonment or other reason. App. 21a, para. 6; 22a, para. 9.

The City distributes its towing work among O'Hare and other tow companies by means of a towing rotation list with the names of the various tow companies to be contacted in turn when a need arises. App. 22a, para. 7. O'Hare has provided the City with towing services via the rotation list for almost thirty years.

App. 22a, para. 9. A substantial part of O'Hare's income came from fees paid by municipalities and others as a result of requests for towing services by Northlake and other municipalities. App. 21a-22a, para. 6.

It has been Northlake's policy and practice that companies on the rotation list will not be removed from the list without cause. Several mayors of Northlake, including Respondent Paxson and Paxson's predecessor, confirmed this policy and stated that O'Hare would remain on the rotation list so long as the quality of its services was maintained. App. 22a, para. 8, 10.

Nevertheless, following the mayoral election in the spring of 1993, O'Hare was removed from the rotation list by Police Chief Sapoznik, acting at the request of newly re-elected Mayor Paxson. App. 23a, para. 14. O'Hare's owner, Mr. Gratzianna, had refused to contribute to Mayor Paxson's re-election campaign, and had publicly supported Mayor Paxson's opponent, placing campaign posters for the opponent in O'Hare's place of business. App. 23a, para. 12, 13. On September 24, 1993, Petitioners filed this action, alleging that Respondents Mayor Paxson, Police Chief Sapoznik, and the City of Northlake, had violated their First and Fourteenth Amendment rights of political association and due process by ceasing to do business with O'Hare in retaliation for Mr. Gratzianna's refusal to contribute financially to Mayor Paxson's campaign and for his support for the Mayor's opponent during the last election.

Respondents moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). The District Court indicated in a preliminary order that it was disposed to grant dismissal based on the Seventh Circuit's holding in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), which rejected any First Amendment protection (whether speech or association) for non-employees. *Id.* at 709 n. 5. Pursuant to the preliminary order, the Petitioners simultaneously submitted a First Amended Complaint and a memorandum of law opposing dismissal arguing that *Downtown Auto Parks* conflicted with pertinent Supreme Court precedent. The District Court subsequently dismissed the First Amended Complaint with prejudice.

On appeal, Petitioners asked the Seventh Circuit to reconsider its broad denial of First Amendment rights to independent contractors in light of the principles enunciated in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and others of this Court's cases. The Seventh Circuit noted that it had already considered the impact of *Rutan* in *Downtown Auto Parks*, however, and refused to revisit the issue. Although the court had acknowledged in *Downtown Auto Parks* that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of" earlier Seventh Circuit decisions rejecting contractors' political association rights as the basis for a claim, the court nevertheless clung to the reasoning of those earlier cases. 938 F.2d at 709. The court concluded that "it should be up to the Supreme Court to extend *Elrod*." *O'Hare*, App. 5a. Relying on *Downtown Auto Parks* and earlier cases, the Seventh Circuit summarily rejected Petitioners' First Amendment claim and affirmed the dismissal.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has held that an independent contractor does not state a claim under the First Amendment, when he complains that the city terminated their business relationship because he declined to support or to contribute to the election campaign of the mayor of the city and instead supported the opposition candidate. Not only is the Seventh Circuit decision in conflict with this Court's

well settled precedent forbidding government to deny benefits because of one's political beliefs and associations, it also contributes to a deepening conflict among the Courts of Appeals over the degree of protection to be afforded to the core political expression and association of independent contractors and the standards under which such claims are to be considered. This case, along with *Heiser v. Umbehr*, No. 94-1654, provides the Court with a most timely opportunity to provide much needed guidance to the Courts of Appeals on several aspects of these important issues.

I. THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING POLITICAL ASSOCIATION WHICH SHOULD BE DECIDED BY THIS COURT

1. Respondents eliminated O'Hare Trucking from the City's referral list to punish Mr. Gratzianna for supporting the political candidate of his choice and declining to support the incumbent mayor. This conduct calls into question the scope of the First Amendment's protection of political association and whether it is broad enough to encompass the political activities of independent contractors.

The circumstances of O'Hare Truck Service's removal from the City of Northlake's towing system confirm that this matter involves the most basic rights of "political belief and association [that] constitute the core of those activities protected by the First Amendment," *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 355-356 (1976) (plurality opinion)), including the rights of a person: to choose his political affiliations; to demonstrate his support for candidates of his choice; and, to decline to associate and to provide financial support to other candidates.

This Court consistently has reiterated that a major purpose of the First Amendment is to protect discussion of governmental affairs, including discussions of candidates for public office. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), the Court referred to campaigns for public office as the "fullest and most urgent application" of the First Amendment. It is equally settled that business entities, as well as individuals, enjoy the right to participate in the political process. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The Court's decisions also have affirmed that the right of a citizen to make political contributions and expenditures is a fundamental First Amendment interest. In *Buckley v. Valeo*, 424 U.S. 1, 16-17, 22-23 (1976), the Court explained the interrelated character of political expression, association, and political spending. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22. Conversely, exaction of contributions from unwilling contributors was described by the Court as "tantamount to coerced belief." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (approvingly citing *Buckley*, 424 U.S. at 19).

This Court should take this case to decide, hopefully in the affirmative, whether terminating valuable business benefits as a patronage practice violates the associational rights of independent contractors. Additionally, this case presents a particularly timely opportunity to rule on this issue because privatization of government services is so rapidly expanding today. *See, e.g.*, G. Washburn, *RTA Chief Urges CTA to Privatize Some Bus Routes*, Chi. Trib., June 9, 1995, Metro West section at 1 (cities nationwide are privatizing former municipal services; over 50 city services contracted out in Indianapolis); J.

Rainey, *Study Urges L.A. to Privatize More Services*, L.A. Times, November 14, 1994 at Metro B1 (Los Angeles' privatization efforts compared to programs elsewhere); G. Justice, *Suburbs Looking to Privatize Services*, Phila. Inquirer, March 17, 1995, Local section at A1 (cities' budget woes are driving trend toward privatization).

2. The Seventh Circuit's decision in this case excluded, as did the decisions of the Third and Eighth Circuit discussed below, an entire class of persons from the protection of the First Amendment "[b]ecause O'Hare is not an employee of the city." *O'Hare*, App. 5a. In holding that independent contractors will not be afforded even the restricted rights of political speech and association that are enjoyed by public employees, the court followed the reasoning of its own prior decisions which had established this disfavored category of independent contractors. *See LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 640 (1991).

However, the appeals court's reasoning distorts the impact of *Elrod*, *Branti*, and *Rutan* and erroneously suggests that those cases gave special status to employees not conferred on others. The Seventh Circuit has taken what was a limited exception to the general protection of the First Amendment and converted it to a limitation upon the right of persons generally. Nothing in the decisions of this Court warrants a blanket denial of the rights of political association based solely upon occupational status. Similar efforts by government bodies to impose complete bans on fundamental First Amendment rights because of a person's identity or occupation have been firmly rejected over the years. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (clergy); *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977) (non-union workers); *Pell v. Procunier*, 417 U.S. 817 (1974) (prisoners); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (students); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (teachers).

Moreover, this Court has ruled in the Fifth Amendment context that government contractors are no less compelled to waive their right against self-incrimination upon threat of loss of contract than government employees faced with loss of a job. *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973). *See also Rutan*, 497 U.S. at 75 (deprivations less harsh than dismissals nevertheless force employees to conform their beliefs).

The Seventh Circuit has never addressed why, in light of these precedents, independent contractors should be treated as a class undeserving of constitutional protection. This Court should decide in this case whether those who serve government as independent contractors are excluded from the protective ambit of the First Amendment and *ipso facto* forfeit their associational rights.

3. In this case, as in others involving governmental interference with the fundamental rights of political speech and association, it is immaterial that O'Hare does not have a right to be or remain on the city's list of approved companies to whom it will refer business. *See Perry v. Sindermann*, 408 U.S. 593 (1972). Protection of these rights of political speech and association is not reserved for persons in government employment. However, even *Elrod* and *Branti* both involved at-will employees with no expectation of continuing employment. *Rutan*, 497 U.S. at 72. And the same was true in *Rutan* for the applicants for jobs and employees and former employees seeking promotions, transfers and recalls after lay-offs, *Id.* 497 U.S. at 72, 77 n. 9.

This case therefore raises the additional and important question of whether the interest in government work of an independent contractor constitutes a "valuable governmental benefit" protected under the *Perry* doctrine of unconstitutional conditions. 408 U.S. at 597.

4. The Seventh Circuit's sole focus upon O'Hare's status as independent contractor precluded the court from properly analyzing O'Hare's claim under the strict legal standards demanded by the First Amendment. Accordingly, it conducted no meaningful analysis of competing interests under any prescribed standard of scrutiny, or other test, enunciated or even obliquely suggested by the prior precedent of this Court. Because the City of Northlake retaliated against O'Hare for its owner's most basic and fundamental rights of political association, petitioner submits that the actions of the city and its mayor are subject to exacting scrutiny. *Buckley v. Valeo*, 424 U.S. at 44-45; *Meyer v. Grant*, 486 U.S. 414, 420 (1988); *McIntyre v. Ohio Elections Comm'n*, ___ U.S. ___, 115 S. Ct. 1511 (1995). While these cases involved government restrictions on the speech and association of private citizens, in *Rutan* the Court used the same exacting scrutiny to examine restrictions on the political associational rights of public employees, 497 U.S. at 74.

In this case, there is no hint of any public governmental interest supporting the removal; the only interest in the record is the mayor's individual financial and political self-interest. Had O'Hare acquiesced in the demand for a political contribution to remain on the rotation list, there would have been a *quid pro quo* arrangement of the type condemned in *Buckley*: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27. Nothing in the record supports any legitimate governmental interest in O'Hare's removal from the rotation list.

Nor do the considerations advanced by the Seventh Circuit in *O'Hare* and its earlier decisions to distinguish the political association rights of independent contractors from those of public employees constitute the type of compelling state interest

required by this Court's decisions. First, relying on its own decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), the Seventh Circuit considered the extent of the likely interference with an independent contractor's freedom to associate politically and found "little chance that a contractor's freedom would be impinged." *O'Hare*, App. 5a. This conclusion was explained in *LaFalce* and in *Downtown Auto Parks* as resting on the court's "surmise" that "independent contractors generally tend to be less dependent on government jobs than are public employees." *Downtown Auto Parks*, 938 F.2d at 709.

The Seventh Circuit's suggestion that the quantum of public business and a contractor's presumed lack of total dependency on that business justify infringements on political association is without support in this Court's decisions. Even if a contractor enjoys other public and private business, that fact does not supply a government interest in retaliating against political speech. One need not be totally dependent on government in order to assert First Amendment rights. For example, the tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), may have been of negligible amount compared to the citizen's income or net worth. Denial of the benefit to punish political belief and association was the essence of the claim, as it is here.

The Seventh Circuit also failed to identify any state interest implicated by its second ground in *LaFalce*, the potential decision of some public contractors to act as "political hermaphrodites" by contributing to both political parties to insulate themselves from retaliation. Of course, any such decision by a private individual or entity to contribute or not contribute is protected by the First Amendment. *See Buckley*, 424 U.S. at 16. That some business owners may choose to contribute broadly provides no justification for coercing political contributions from those who would refrain from supporting some or all can-

didates. *Elrod*, 427 U.S. at 355; *Rutan*, 497 U.S. at 69; *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

The appellate court apparently confused the interests of an incumbent with the interests of his municipality. The interests of party and officeholder and the legitimate interests of government often conflict; in this case the Seventh Circuit has upheld the interests of the official without appropriate consideration of the public interest.

This Court should grant this petition so that it may define the level of scrutiny which attaches to the rights in issue here. The Court should then ascertain whether there could be any compelling, vital, or overriding governmental interest to justify the restriction of core political association and whether such restrictions are narrowly tailored.

II. THE SEVENTH CIRCUIT'S DECISION CONTRIBUTES TO A DEEP CONFLICT AMONG THE FEDERAL COURTS OF APPEAL REGARDING THE PROTECTION OF INDEPENDENT CONTRACTORS' RIGHTS OF POLITICAL ASSOCIATION

A deep division currently exists among the federal courts of appeal concerning the ability of government to punish independent contractors on the basis of political association. Two radically different conceptions of First Amendment rights outside of the employment context underlie this disagreement. The decisions also display a general confusion as to the constitutional principles that are applicable. Unfortunately, the opportunities for conflict and confusion will only multiply, as more and more local units of governments privatize services that once were performed by government employees. For all of these

reasons, the Court should address this area of law and resolve the confusion in the circuits.

The Seventh Circuit's decision in the present case rests on a line of cases dating back to *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), in which the court refused to afford contractors the First Amendment freedom of political association which government employees possess under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). The court distinguished the situations of independent contractors and public employees, hypothesizing that contractors were better equipped economically than employees to deal with any coercive pressure from politically-based decision-making. Although the court found in *Downtown Auto Parks*, 938 F.2d 705, that much of the support for this position had been eroded by *Rutan*, the court reasoned that the Supreme Court had not yet directly addressed the rights of independent contractors *per se*. *Id.* at 709-710. Accordingly, the Seventh Circuit was free to continue to hold that the government may retaliate against a contractor for that contractor's speech or political associations. The Seventh Circuit makes no distinction between free speech and association cases, affording no protection to independent contractors in either situation. *Id.* at 709 n.5.

Other federal courts of appeal, including the Third and the Eighth Circuits, have taken the same position as the Seventh Circuit. In *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc), the Third Circuit agreed with the rationale of *LaFalce* and refused to apply *Elrod* and *Branti* to recognize a cause of action for a contractor claiming retaliation because of his party affiliation. That court has not revisited the issue of independent contractors' First Amendment rights since that decision. The Eighth Circuit case, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982), predated *LaFalce* and, like *Horn*, rejected a claim of

retaliation against an independent contractor based on party affiliation. While *Sweeney* is still the law of the Circuit for association or patronage cases involving independent contractors, that court recently retreated somewhat from that position by allowing an independent contractor to bring a claim of retaliation for the exercise of his right to free speech. *See Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989) (the free speech claims of an independent contractor who was analogous to an employee could be considered).

In direct opposition to the Seventh Circuit's approach, the Tenth Circuit in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), recognized political association by an independent contractor (a towing company's lack of support for a mayor during a re-election campaign) as activity protected by the First Amendment. The court relied on *Perry* and *Elrod* for the more general principle that the government may not deny a person a benefit on any basis that infringes his constitutionally protected interests. *Id.* at 1233. Also in contrast to the Seventh Circuit's position, the Fifth Circuit earlier this year ruled that the government may not penalize an independent contractor for exercising his First Amendment freedom of speech simply because it does not like the content of that speech. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995).

While *Blackburn* is limited to free speech and not political association, it implicitly rejects the blanket ban on contractors' expressive rights formulated by the Seventh Circuit. As the Court explained in *Blackburn*:

> At the outset, we reject the district court's apparent assumption that only public employees enjoy the protections of the First Amendment. The district court's reasoning is inverted. Every citizen enjoys the First Amendment's protections against governmental interference with free speech, but the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship.

Id. at 931.

The *Blackburn* court went on to identify a two-tier analysis. If the claimant is either a public employee or closely akin to one, the test announced in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), applies. For non-employees or ordinary citizens, "a court generally examines a free speech claim under the more First Amendment friendly standard enunciated in *Perry* [*v. Sindermann*, 408 U.S. 593 (1972)]." 42 F3d at 932. Because the tow truck operator bringing the claim in *Blackburn* was not similar to an employee, the court applied the *Perry* test.

Recently, and in conformity with its earlier decision in *Abercrombie*, *supra*, the Tenth Circuit in *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __ (certiorari granted June 29, 1995) (No. 94-1654), agreed with this analysis. Although *Heiser* involved a free speech claim only, the court noted in *dictum* that associational ties also enjoy protection from governmental interference, citing *Rutan*, 497 U.S. at 76:

> The Court stated the overriding principle as follows: The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

Umbehr, 44 F.3d at 882. (*See also Perry*, 408 U.S. at 597 ("For if the government could deny a benefit to a person because of his constitutionally protected speech *or associations*, his exer-

cise of those freedoms would in effect be penalized and inhibited") (emphasis added)). The Tenth Circuit recognized that this holding placed it squarely in conflict with the position adopted by other circuits, including the Seventh Circuit in *LaFalce* (and *O'Hare*), and specifically requested Supreme Court guidance to clarify this area. *Id.* at 883.

The Ninth Circuit has not decided a case on the First Amendment rights of independent contractors *per se*, but its decision in *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2337 (1993), indicates its agreement with the position taken by the Fifth and Tenth Circuits. Other federal courts of appeals have given independent contractors the same First Amendment rights as public employees, judging their free speech claims under the *Pickering/Connick* standard. In *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 185 (1993), the Second Circuit applied the *Pickering/Connick* test on the assumption that a towing operator who did not have a formal contract with the state nevertheless had an interest "tantamount to employment." *Id.* at 1059. Similarly, in *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), the Eighth Circuit found that a doctor-hospital relationship was sufficiently similar to an employment relationship that *Pickering* governed the doctor's free speech claim.

Unfortunately, the courts adopting these two approaches rarely identify or enunciate the underlying theories, and, as a result, confusion reigns in an ever-widening area of law. Political association cases such as the present one, which involve a contractor's refusal to provide support, financial or otherwise, to an incumbent public official in an election, are a particular source of confusion because they involve both freedom of speech and freedom of association concerns. Courts often gloss over the dual nature of these cases.

The need for this Court to clarify the standards applicable in this area will only become more pressing in the future. State and local governments nationwide are in the midst of privatizing an increasing amount of their business in an effort to control the costs of government.

As Judge Gibbons noted in dissent,

> . . . the majority's holding will encourage the contracting out of governmental functions. Public employees no longer needed because their work has been contracted out can then be freely discharged as surplus, while the officials in government will remain free to pressure contractors and their employees to support incumbent politicians. The employees of such contractors, forced against their will to contribute time, money, and loyalty to a party not of their choice, will be remediless when faced with the state-law, at-will employment doctrines.

Horn v. Kean, 796 F.2d at 684.

The attention of the Court is urgently needed to prevent wildly varying decisions that are likely to result from courts faced with the growing trend of privatization.

III. THE ISSUES PRESENTED BY THIS CASE DIFFER IN IMPORTANT RESPECTS FROM THOSE PRESENTED IN *HEISER v. UMBEHR*; THE COURT SHOULD ADDRESS BOTH SETS OF ISSUES

On June 29, 1995, this Court granted certiorari in *Heiser v. Umbehr* (decision below, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995)). While that case, like this one, involves the issue of

whether First Amendment rights extend to those who provide services to the government, it involves only a free speech claim. As a result, a decision by this Court in *Heiser* likely will be restricted to the issue of a contractor's free speech claims unrelated to political association issues. Thus, *Heiser* is as far from resolving the issues presented by *O'Hare* and its kin as *Pickering* was from resolving the issues presented by *Elrod* and its progeny.

Even after this Court reaches a decision in *Heiser*, courts are likely to continue to have difficulty distinguishing political association claims from other speech claims by contractors, and will apply various tests on an *ad hoc* basis. Courts will continue to be divided (as they are now) over several points: whether the tests applicable to an employee's free speech claims should also be applied to an independent contractor's political association claims; whether political association cases should be governed by the *Elrod/Branti/Rutan* analysis, or whether courts should attempt to define for themselves some blended type of analysis in political association cases. None of these questions is likely to be resolved by the Court's ultimate decision in *Heiser*. Because the need for guidance is as pressing in the area of contractors' political association rights as in the speech area, Petitioners urge this Court to resolve both issues by accepting this case for review as well.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition for remand pending the resolution of *Heiser*.

Respectfully submitted,

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July 31, 1995

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

O'HARE TRUCK SERVICE, INCORPORATED AND JOHN A. GRATZIANNA,
Plaintiffs-Appellants,

v.

CITY OF NORTHLAKE, REID PAXSON, MAYOR, AND SEYMOUR SAPOZNIK, POLICE CHIEF,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94-1222, No. 93 C 5860
-- **Milton I. Shadur,** *Judge.*

Before HON. DONALD P. LAY*, *Circuit Judge*, HON. FRANK H. EASTERBROOK, *Circuit Judge*, HON. MICHAEL S. KANNE, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

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* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

In the
United States Court of Appeals
Seventh Circuit

No. 94-1222
O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,
Plaintiffs-Appellants,

v.

CITY OF NORTHLAKE, REID PAXSON, MAYOR, and SEYMOUR SAPOZNIK, POLICE CHIEF,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5860--**Milton I. Shadur**, *Judge*.

ARGUED SEPTEMBER 12, 1994 - DECIDED FEBRUARY 10, 1995

Before LAY*, EASTERBROOK, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. O'Hare Truck Service, Inc. and its owner John Gratzianna (collectively "O'Hare") filed this suit under 42 U.S.C. § 1983 against the City of Northlake, Illinois, its present mayor Reid Paxson and police chief Seymour Sapoznik (collectively "Northlake"). O'Hare claims that

* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

Northlake violated both its First Amendment and procedural due process rights. As the case was dismissed on the pleadings, we rely on the facts alleged in O'Hare's complaint.

Northlake, a suburb of Chicago, is a city of approximately 12,000 people. From time to time, Northlake's police department needs a vehicle towed. Northlake does not tow vehicles itself, and it does not contract directly with a tow company for services. Fees for towing services are paid by the towed vehicle's owner.

Since at least 1965, the police department has maintained a "rotation list." On the rotation list are a number of tow companies from the area (we do not know how many). When a vehicle tow is necessary, the police dispatcher is notified and calls a company on the list. If that company does not answer or cannot respond to the request, the dispatcher calls the next towing company listed until a company responds and makes the tow. When towing services are again required, the police dispatcher begins with the next company on the list — and so on — in rotation.

O'Hare alleges that the previous Northlake mayor, Gene Doyle, had told Gratzianna that his company would remain on the rotation list as long as it maintained the quality of its services. Furthermore, O'Hare claims that, shortly after Paxson was elected mayor in 1989, Paxson told Gratzianna "that he was pleased with the services provided by [O'Hare] and would continue the policy of former Mayor Doyle to retain O'Hare, and others, on the rotation list so long as the quality of services were maintained." Before the 1993 election for mayor of Northlake, Paxson's re-election committee solicited a campaign contribution from Gratzianna. Gratzianna refused and publicly supported Paxson's opponent. Paxson won reelection, and shortly thereafter O'Hare was removed from the rotation list.

As we are reviewing the district court's dismissal of the ac-

tion under 12(b)(6), we accept as true well pled facts and make all reasonable inferences in favor of O'Hare. *Propst v. Bitzer*, 39 F.3d 148, 154 (7th Cir. 1994).

I. First Amendment

O'Hare claims that, by removing it from the rotation list in response to its support of Paxson's mayoral opponent, Northlake infringed its First Amendment right to freedom of political association. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), the Supreme Court held that most government employees may not be discharged solely on the basis of their political affiliation. The Court extended its holding in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), to cover hiring, promotion, transfers and recalls as well.

Most courts that have explicitly addressed the issue whether to extend *Elrod*'s protection beyond government employees, however, have refused to do so. *See, e.g., Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044, 104 S. Ct. 712, 79 L. Ed. 2d 175 (1984); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied*, 459 U.S. 878, 103 S. Ct. 174, 74 L. Ed. 2d 143 (1982). Recently, however, in *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995), the Fifth Circuit, in a case similar to the one now before us, implicitly took a contrary position. *See also Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990). On the other hand, in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), this circuit held (consistent with *Horn*, *LaFalce*, and *Sweeney*) that a city may refuse to renew a parking lot lease with an independent contractor based upon that contractor's political affiliation. The

plaintiff in *Downtown Auto Parks* asked that we reexamine, in light of *Rutan*, our holding in *LaFalce*, the first case in this circuit that declined to afford independent contractors *Elrod*'s protection.

In *LaFalce*, we gave three reasons for declining to extend *Elrod* to independent contractors. First, we examined the extent of the likely interference with an independent contractor's freedom to associate politically. We found that, compared to the impact on governmental employees, there was little chance that a contractor's freedom would be impinged. Second, we noted that the practical, administrative consequences of extending *Elrod*'s protection could be severe. "A practical consideration reinforcing our caution is that a decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.* at 294. Third, in light of these considerations, the court concluded that it should be up to the Supreme Court to extend *Elrod*. *Id.* at 295. The court in *Downtown Auto Parks* declined to overrule *LaFalce*, noting that although "*Rutan* did extend First Amendment protection, [it did so] only within the context of government employment." *Downtown Auto Parks*, 938 F.2d at 710. We likewise refuse to revisit the issue. Because O'Hare is not an employee of the city, we hold that the district court did not err in dismissing O'Hare's First Amendment challenge.

II. Due Process

O'Hare also claims that Northlake violated its procedural due process rights by removing it from the rotation list without holding a hearing or giving it reasons for the removal. The district court dismissed O'Hare's procedural due process claim;

it concluded that O'Hare did not have a property interest in remaining on the rotation list. The district court based its holding on our statement in *Wolf v. City of Fitchburg*, 870 F.2d 1327 (7th Cir. 1989), that "the 'mutually explicit understandings' that constitute property interests under the holding of *Perry* cannot be based on the representations of government officials who are not authorized to make such representations." *Id.* at 1334.

The mutually explicit understandings referred to by the district court stems from two Supreme Court decisions in the early 70s. In *Board of Regents of State Colleges v. Roth*, the Supreme Court explained that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

In *Roth's* companion case, *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972), the Court stated, "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." The Court invoked the state law concept of implied contracts (a type of mutually explicit understanding) to hold that the respondent, a teacher in the state college system in Texas, might have had a right to a pretermination hearing due to "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id.*, 408 U.S. at 602, 92 S. Ct. at

2700.

O'Hare seeks to bring its situation under this mutually explicit under- standings jurisprudence. The most common form of mutually explicit understanding is an implied contract, and the district court's analysis centers on this area. The district court's conclusion that the mayor lacks authority to bind the city to an implied contract might well be correct. Yet we believe that the district court's focus on whether O'Hare could prove a contract interest was too narrow.[1] As it did in this court, O'Hare simply, but rather vaguely, argued to the district court that because other courts had found a property interest in remaining on a towing list it should also.[2]

A number of courts have found a towing company to possess a property interest in remaining on a rotation list. In those cases, state statutes, or city ordinances or police department rules passed pursuant to statute, created the property interest. *See Pritchett v. Alford*, 973 F.2d 307, 317 (4th Cir. 1992) (plaintiff had property interest due to South Carolina regulations); *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990) (plaintiff had property interest due to Oklahoma wrecker statute); *Gregg v. Lawson*, 732 F. Supp. 849, 853

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[1] Moreover, a contract analysis is inapposite. The only contract that conceivably arises is between O'Hare and the owner of the towed vehicle. Northlake pays O'Hare nothing, and O'Hare performs no direct service for the city.

[2] A party is deemed to have forfeited any legal argument not raised before the district court. *E.g., Citizens Ins. Co. of America v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994). While O'Hare's legal argument before this court and the district court for finding a property interest was not a model of clarity, we do not believe that it was not made. The plaintiffs in the cases relied on by O'Hare argued that a statute or regulation gave them a property interest. We interpret O'Hare's argument to be the same.

(E.D.Tenn.1989) (plaintiff had property interest due to regulations); *but see White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1062 (2nd Cir. 1993) (holding that plaintiff did not have property interest in towing assignment because arrangement was informal, in that no statute or regulation governed the assignment and plaintiff had no contract interest in assignment).

O'Hare admits that no statute, ordinance or written rule governs the rotation list. But, O'Hare appears to argue that Northlake's policy and practice concerning the rotation list rises to the level of an informal or unwritten administrative rule, bestowing upon it a property interest in remaining on the rotation list.

We have, of course, found property interests arising from internal rules or regulations, but only when they have the force of law. *See, e.g., Hohmeier v. Leyden Community High Sch. Dist. 212*, 954 F.2d 461 (7th Cir. 1992); *Miller v. Henman*, 804 F.2d 421, 424 (7th Cir. 1986); *see also Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S. Ct. 1468, 1471, 67 L. Ed. 2d 685 (1981) (holding that Claims Manual of the Social Security Administration "is not a regulation. It has no legal force and does not bind the SSA.").[3] Because property interests are defined by reference to state law, *see Roth*, 408 U.S. at 577, 92 S. Ct. at 2709, we must look to whether Illinois law recognizes such a claim. Outside the employment context (which is inapplicable because O'Hare is clearly not an employee), we have

[3] We note that, even if a rule or regulation has been promulgated in accordance with formal procedures, a person may not have a property interest in having the procedures followed. *See Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (holding that in order to provide property interest, a regulation must establish "substantive predicates" that govern official discretion); *see also DeTomaso v. McGinnis*, 970 F.2d 211, 213 (7th Cir. 1992).

found no Illinois case that recognizes a legal entitlement based on implied or informal rules or regulations.

Moreover, with one exception,[4] O'Hare does not point us to, nor have we independently discovered, any decisions in other states which recognize such an entitlement. In this case, unwritten and informal policies and procedures relating to an internal police operation for securing the towing of vehicles in Northlake cannot be used as a basis for O'Hare to secure a property interest in being maintained on the rotation list.

For the reasons stated above, we AFFIRM the district court's dismissal of O'Hare's complaint.

[4] In *Morris v. McCallie*, Civ. 4-91-032, 1993 WL 625544, slip op. (E.D. Tenn. 1993), the district court held that a wrecker service held a property interest in remaining on a rotation list. In *Morris*, the Sheriff of Franklin County maintained an informal rotation list similar to the one in this case. It is unclear, however, whether the plaintiff held the interest due to an implied contract or due to the informal rules set out by the Sheriff. Moreover, the court seemed especially swayed by "[t]he fact that the Sheriff indicated that written regulations would eventually be adopted . . . ." *Id.* at 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 5860

O'HARE TRUCK SERVICE, INC., *et al.*,
Plaintiffs,

v.

CITY OF NORTHLAKE, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge:

This Court's December 8, 1993 memorandum opinion and order (the "Opinion," a copy of which is attached) addressed the motions that had been filed by City of Northlake ("Northlake") and its Mayor Reid Paxson ("Paxson") and its Police Chief Seymour Sapoznik ("Sapoznik") to attack the Complaint brought against the three of them by O'Hare Truck Service, Inc. ("O'Hare") and its owner John Gratzianna ("Gratzianna"). For the reasons stated in the Opinion — focused in principal part on our Court of Appeals' decision in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) — O'Hare and Gratzianna were ordered to file either (Opinion at 1235):

1. a memorandum identifying any relevant authority (presumably post-*Downtown Auto Parks*) that preserves either or both of the claims set out in the Complaint or

2. an Amended Complaint stating a differently framed claim or claims — claims capable of being advanced under Section 1983 in the objective and subjective good faith demanded by Rule 11 — that is or are viable in light of *Downtown Auto Parks*.

In response O'Hare and Gratzianna have tendered both a proposed First Amended Complaint ("FAC") and a supporting Memorandum of Law, and they are granted leave to file both of those documents.

As the O'Hare-Gratzianna motion for leave to file those papers says, the FAC "does not change the substance of plaintiffs' claims, but rather adds additional detail." That statement must be read as their acknowledgement that if the FAC's amplification does not do the job either, the "existing flaws are both incurable and inevitably fatal" (Opinion at 1235 n. 1).

This Court has therefore reviewed both the FAC and all of the cases that are sought to be relied on in the Memorandum of Law, and it concludes that the problems initially identified in the Opinion have not been and cannot be overcome by O'Hare and Gratzianna. Accordingly both the FAC and this action are dismissed for the reasons stated both in the Opinion (which of course need not be repeated here) and in this opinion.

Due Process Claim

Because O'Hare-Gratzianna Mem. 2-5 first speaks to their due process claim as set forth in FAC Count II, this opinion will do the same. O'Hare and Gratzianna seek to blunt (or to shunt aside entirely) the fatal impact of *Downtown Auto Parks* by citing to a number of cases from other jurisdictions, all of

them dealing with the cancellation or nonrenewal of towing services— cases that (wholly unlike *Downtown Auto Parks*, 938 F.2d at 710-11) do find a "property" interest in the sense that is demanded by the Fourteenth Amendment and by the seminal decisions applying it in this area of law (*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972)).

But all except one of those other decisions dealt with formalized official sources of property rights — created by the relevant state law, as *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709 teaches must be the case — of types that are wholly absent here:[1]

1. In *Gregg v. Lawson*, 732 F. Supp. 849, 854 (E.D.Tenn.1989), "printed rules and regulations govern the parties' conduct and formal application procedures exist for anyone wanting to be placed on the list."

2. *Jennings v. Waldrop*, No. 3:86-cv-102-GET, slip op. (N.D.Ga.1988) dealt with a "written policy of the State Patrol" that set express limitations on a wrecker's removal from the list.

3. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1232 (10th Cir. 1990) was based upon rights expressly created by statute.

4. *Pritchett v. Alford*, 973 F.2d 307, 317-18 (4th Cir. 1992) was similarly grounded on rights that had been formally and

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[1] For some reason O'Hare-Gratzianna Mem. 3-4 does not examine the cited Courts of Appeals' cases before turning to the cited District Courts' opinions. As illogical as that may be, this opinion will follow the same sequence as their Memorandum.

expressly created—in that instance by formally adopted regulations. Only the unpublished opinion in *Morris v. McCallie*, Civ. 4-91-032, slip op. (E.D. Tenn. 1993) dealt with a situation that resembled the informal practice described in the current case, nonetheless finding that the wrecker had a "property" interest under those circumstances.

But we are regularly reminded by our own Court of Appeals that opinions by district judges do not create precedents in their own bailiwicks, let alone on foreign soil.[2] And for its part our Court of Appeals has regularly continued to make it plain that "the 'mutually explicit understandings' that constitute property interests under the holding of *Perry* cannot be based on the representations of government officials who are not authorized to make such representations" (*Wolf v. City of Fitchburg*, 870 F.2d 1327, 1334 (7th Cir. 1989), quoted and reconfirmed in *Santella v. City of Chicago*, 936 F.2d 328, 331 (7th Cir. 1991)). Nothing that is alleged in the FAC about the practice followed by Northlake's prior Mayor satisfies the need for a binding and enforceable right — to the contrary, the FAC says nothing at all about any ordinance adopted, or any other action taken, by Northlake's governing body that is authorized to make such commitments (*Santella*, 936 F.2d at 331-32).

Accordingly what was said in the Opinion remains true. *Downtown Auto Parks*, coupled with the other uniform case law from our Court of Appeals that fleshes out the concept of

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[2] O'Hare-Gratzianna Mem. 4-5 also inexplicably seeks to rely on the opinion of this Court's colleague Honorable Charles Kocoras in *Medcare HMO v. Bradley*, 788 F. Supp. 1460 (N.D. Ill. 1992). As this opinion later reflects, *Medcare HMO* in fact supports this Court's determination rejecting the FAC's other (free-speech-based) claim. And as for the FAC's due process claim, *Medcare HMO* treated with a statutorily conferred right—the paradigmatic example of a state-created property interest.

"property" for due process purposes, mandates the dismissal of the O'Hare-Gratzianna due process claim.[3]

First Amendment Claim

As to the free-speech-based claim advanced in FAC Count I, O'Hare-Gratzianna Mem. 6 urges that *Downtown Auto Parks* cannot be reconciled with *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). But in the judicial hierarchy, district judges are bound by the teaching of their Courts of Appeals. And here is what *Downtown Auto Parks*, 938 F.2d at 710 (citations to decisions by other Courts of Appeals omitted) says about the effect of *Rutan*:

> *Rutan* did extend First Amendment protection, but only within the context of government employment. *Rutan* was the culmination of a line of cases "concerned only with the constitutionality of dismissing public employees for partisan reasons." *Elrod* [*v. Burns*], 427 U.S. [347] at 353, 96 S. Ct. [2673] at 2680 [49 L. Ed. 2d 547] [(1976)]. All circuits considering the question of whether to extend the holdings of *Elrod* and *Branti* [*v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574] [(1980)] to independent contractors have declined. Since *Rutan* was decided, the Sixth Circuit has also refused to prohibit the government from considering political criteria in awarding of

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[3] As suggested in Opinion at 1235, Paxson and Sapoznik are also entitled to be dismissed on qualified immunity grounds, even apart from the holdings just announced and to be announced in the text. Neither of the rights sought to be asserted here by O'Hare and Gratzianna was "clearly established" within the teaching of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) and their progeny at the time that Northlake's towing needs ceased to be referred to O'Hare.

> public contracts. We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable.

Judge Kocoras has already rejected a litigant's invitation to disavow *Downtown Auto Parks* on the authority of *Rutan* (*Medcare HMO*, 788 F. Supp. at 1465-66), and this Court of course does the same.[4] Thus nothing asserted in the current filings by O'Hare and Gratzianna has altered the Opinion's indications in this respect either. Dismissal of the O'Hare-

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[4] O'Hare-Gratzianna Mem. 6-7 points to *Lipinski v. Dietrich*, 578 F.Supp. 235 (N.D. Ind. 1984), and to the manner in which it was distinguished in *Downtown Auto Parks*, 938 F.2d at 710, as support for their own First Amendment claim. Although the District Court opinion in *Lipinski* would certainly provide such support, the Court of Appeals in *Downtown Auto Parks* did not itself hold that *Lipinski* was decided correctly—on the contrary, it simply assumed that arguendo in the course of deciding that the case would not help the plaintiff there anyway. This Court has examined the issue independently, and it holds that where an independent contractor has no entitlement to an ongoing relationship with a governmental unit (that is, no "property" interest, as already found here), but only a hoped-for continuation of that relationship (which is thus the legal equivalent of the governmental unit's granting a series of awards of business to that independent contractor), no principled distinction may be drawn between the government's discontinuance of that relationship and the government's refusal to deal with an independent contractor in the first instance: In each instance a claim that the nondealing was free-speech- based must be viewed through the same lens. Hence what was said in *Downtown Auto Parks*, 938 F.2d at 710 applies here with equal force:

> In sum, plaintiff's First Amendment claim must be dismissed because the City was not prohibited from allowing politics to influence its decision not to award a contract to plaintiff.

Gratzianna "freedom of speech" claim is required as well.

Conclusion

Although Paxson and Sapoznik have legitimate dual grounds for dismissal from this action (see n. 3), their second ground is not essential to the end result: This lawsuit is dead on the bases discussed in the text of this opinion — bases that those individual defendants share with Northlake itself. Both the FAC and this action are dismissed with prejudice.

ATTACHMENT

MEMORANDUM OPINION AND ORDER

City of Northlake ("Northlake") and its Mayor Reid Paxson ("Paxson") and its Police Chief Seymour Sapoznik ("Sapoznik") have filed motions attacking the Complaint brought against the three of them by O'Hare Truck Service, Inc. ("O'Hare") and its owner John Gratzianna ("Gratzianna"). All three defendants seek dismissal of this action (not merely of the Complaint) under Fed.R.Civ.P. ("Rule") 12(b)(6),[1] while Paxson and Sapoznik also move separately for summary judgment under Rule 56.

Even though O'Hare and Gratzianna have not yet had the opportunity to respond to the newly-filed motions, the principle that could call for dismissal of their existing Complaint is so plain — deriving as it does from a recent opinion of our Court of Appeals on all fours — that this opinion is being issued sua sponte to focus the required response by counsel for O'Hare and Gratzianna. Here in brief is what the Complaint asserts:

[1] What the Rule 12(b)(6) motion actually asks for is the "dismissal with prejudice of plaintiffs' Complaint." Because a with-prejudice dismissal forecloses any possible cure of a defective complaint and carries with it a claim-preclusive effect, a court should not consider entering such an order unless the complaint's existing flaws are both incurable and inevitably fatal. As the text of this opinion will reflect, this Court is instead giving O'Hare and Gratzianna the opportunity to go back to the drawing boards if needed.

1. O'Hare has been one of a number of companies that provide towing services when called upon to do so by Northlake. Indeed, for nearly three decades O'Hare has been on the "rotation list" of those asked to provide such services from time to time.

2. Earlier this year Gratzianna refused to contribute to Paxson's re-election campaign as Northlake's Mayor (he supported Paxson's opponent instead). For that reason Sapoznik assertedly cut O'Hare from the rotation list at Paxson's direction.

To provide this District Court with subject matter jurisdiction over that set of allegations, O'Hare and Gratzianna must set forth a federal question claim or claims. They seek to do so by invoking 42 U.S.C. § 1983 ("Section 1983"), claiming the violation of their constitutional rights to freedom of speech and to due process of law.

But *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) sounds the death knell of both of those claims. *Downtown Auto Parks* teaches that a non-employee of a unit of state government, in the absence of a contractual relationship with that governmental body, lacks any interest in property such as to render actionable under Section 1983 any infringement of the non-employee's expectation of doing business with the governmental body. In so holding as to a freedom-of-speech claim, our Court of Appeals refused to extend

beyond an actual employer-employee relationship the First Amendment protection pronounced in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). And *Downtown Auto Parks* rejects any non-employee's cause of action of the type advanced here under Section 1983 — either in terms of a claimed violation of free speech (938 F.2d at 708-10) or in terms of any claimed entitlement to due process of law (*id.* at 710-11).

That set of principles clearly dooms O'Hare's and Gratzianna's present federal claims against Paxson and Sapoznik as well as against Northlake itself. And that is so even without reference to the further fatal defect that exists in relation to Paxson and Sapoznik (a defect that really follows a fortiori): the fact that neither of the rights sought to be asserted here by O'Hare and Gratzianna was "clearly established" so as to overcome Paxson's and Sapoznik's qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) and their progeny.

O'Hare and Gratzianna are therefore ordered to file in this Court's Chambers on or before December 28, 1993, either:

1. a memorandum identifying any relevant authority (presumably post-*Downtown Auto Parks*) that preserves either or both of the claims set out in the Complaint or

2. an Amended Complaint stating a differently framed claim or claims—claims capable of being advanced under Section 1983 in the objective and subjective good faith demanded by Rule 11 — that is or are viable in light of *Downtown Auto Parks*. At the ensuing status hearing set for 9:00 a.m. December 30, 1993, this Court expects to act on the current motions in light of this opinion and of the content of any such filing.

Date: December 8, 1993.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 93 C 5860
Judge Shadur

O'HARE TRUCK SERVICE, INC. AND JOHN A. GRATZIANNA,
Plaintiffs,

v.

CITY OF NORTHLAKE, *et al.*,
Defendants.

Jury Demanded

FIRST AMENDED COMPLAINT

Now come the plaintiffs, O'Hare Truck Service, Inc. (hereinafter "O'Hare") and John A. Gratzianna and complain of the defendants, City of Northlake (hereinafter "Northlake"), Mayor Reid Paxson (here-inafter "Paxson"), Police Chief Seymour Sapoznik (hereinafter "Sapoznik") as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to 42 U.S.C. Section 1983 in that plaintiff has been deprived of his rights secured by the First and Fourteenth Amendments to the United States Consti-

tution, to wit, freedom of speech and due process of law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331, 1334 and 2201. Venue lies in the district court for the Northern District of Illinois pursuant to 28 U.S.C. Section 1391, because all relevant acts occurred within this district.

PARTIES

2. The plaintiff, O'Hare Truck Service, Inc. is an Illinois corporation with its principal place of business in the City of Northlake, Cook County, Illinois. O'Hare Truck Service, Inc., in addition to other services, provides towing services at the request of municipalities throughout Cook and DuPage counties. O'Hare Truck Service, Inc. is owned and operated by plaintiff John A. Gratzianna.

3. The City of Northlake is a duly constituted municipal corporation and body politic, located in Cook County, Illinois.

4. Paxson is, at all relevant times herein, the Mayor of the City of Northlake and its principal policy maker. He is sued in his individual capacity.

5. Sapoznik is, at all relevant times herein, the Chief of Police of the City of Northlake. He gained and maintains his position as Chief of Police by appointment of defendant Paxson. He is sued in his individual capacity.

COUNT I -- FREEDOM OF SPEECH

6. The plaintiffs provide towing services to municipalities. When a need arises for the towing of a vehicle, as a result of an accident, mechanical breakdown, abandonment or other reason, plaintiff is contacted by the municipality in which the vehicle is located and asked to provide towing services. The plaintiffs earn a substantial part of their incomes from fees paid by

municipalities and private individuals as a result of requests for towing services by various municipalities.

7. In order to procure towing services under the circumstances described above, the Northlake Police Department has maintained and continues to maintain a towing rotation list (hereinafter "rotation list"). When the need for towing services arises in Northlake the police department contacts the towing service which is next in line on the rotation list and requests towing services.

8. It has been the policy and practice of Northlake and the Northlake Police Department since 1965 and before to request towing services from the rotation list. It has been the policy and practice of Northlake and the Northlake Police Department since at least 1965 that entities on the rotation list will not be removed from the rotation list without cause.

9. The plaintiff O'Hare has been on the Northlake rotation list since 1965 and has provided towing services at the request of Northlake since 1965 as a result of its placement on the rotation list.

10. The plaintiffs had a mutual understanding with former Mayor Gene Doyle (predecessor to defendant Paxson) and the City of Northlake that O'Hare would remain on the Northlake rotation list so long as the quality of its services were maintained. Shortly after the election of defendant Paxson to the office of Mayor of Northlake in 1989 he stated to plaintiff Gratzianna that he was pleased with the services provided by plaintiffs and would continue the policy of former Mayor Doyle to retain O'Hare, and others, on the rotation list so long as the quality of services were maintained.

11. In 1993 defendant Paxson ran for reelection to the position of Mayor of Northlake.

12. Although plaintiff John A. Gratzianna was solicited for campaign funds by Paxson's campaign committee, he refused

to contribute to Paxson's reelection campaign.

13. Instead, John A. Gratzianna openly supported Paxson's opponent for the office of Mayor. Campaign posters for Paxson's opponent were displayed at plaintiff O'Hare's place of business.

14. In retaliation for the activities described in paragraph 11 and 12, defendant Sapoznik, upon information and belief, at the direction of defendant Paxson, removed plaintiff O'Hare from the Northlake rotation list on or about July 8, 1993.

15. As a direct and proximate result of defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have lost substantial income.

16. At all relevant times herein it has been the policy and practice of Northlake, as set by defendant Paxson, to use the powers and authority of Northlake to retaliate against political opponents of defendant Paxson.

17. The actions of defendants Paxson and Sapoznik as described in paragraph 13 occurred in conformance with and as a result of the policy and practice of Northlake as described in paragraph 15.

18. As a direct and proximate result of the defendants' removal of plaintiff O'Hare from the towing rotation list the plaintiffs have suffered a chilling effect upon the exercise of their constitutional right of freedom of speech and have suffered harm and injury.

19. The actions of the defendants as described herein were taken intentionally and with callous indifference to plaintiffs' federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this court will grant the following relief:

A. A preliminary and permanent injunction restraining the defendant from continuing to violate plaintiffs' federally protected rights and ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in this matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

COUNT II -- DUE PROCESS OF LAW

20. As and for paragraph 20 of Count II, the plaintiffs reallege and incorporate the allegations set forth in paragraphs 1 through 19 as if fully set forth here.

21. Despite a request from the plaintiffs, the defendants have at no time given any reason for the removal of plaintiff O'Hare from the tow rotation list. At all relevant times herein the towing services provided by plaintiffs at the request of defendants have been professional and competent.

22. The plaintiffs were not provided notice of O'Hare's removal from the tow rotation list; the plaintiffs were not provided an opportunity to object to O'Hare's removal from the tow rotation list; the plaintiffs were not provided a hearing at which to contest O'Hare's removal from the tow rotation list.

23. The plaintiffs had a property interest in O'Hare remaining on the tow rotation list and, therefore, had a right to due

process of law protected by the fourteenth amendment to the U.S. Constitution, prior to its removal from the rotation list.

24. The plaintiffs were denied their right to due process of law when defendants removed O'Hare from the tow rotation list without notice and an opportunity to object as described in paragraphs 20 and 21.

25. The actions of the defendants in denying plaintiffs' rights to due process of law were taken intentionally and with callous indifference to plaintiffs' federal constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this court will grant the following relief:

A. A preliminary and permanent injunction ordering plaintiff O'Hare's return to the Northlake tow rotation list;

B. A declaratory judgment stating that defendants have violated plaintiffs' federally protected rights;

C. Judgment for compensatory damages in favor of the plaintiffs and against the defendants in an amount to be set by the jury in this matter;

D. Judgment for punitive damages in favor of the plaintiffs and against defendants Paxson and Sapoznik in an amount to be set by the jury in this matter;

E. An award for reasonable costs and attorney's fees as authorized by 42 U.S.C. Section 1988;

F. For such other relief as this court deems just.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, plaintiffs demand trial by jury.

Respectfully submitted,

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